# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## SPECIAL CIVIL APPLICATION No. 23419 of 2005

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE D.A.MEHTA**
**HONOURABLE MS.JUSTICE H.N.DEVANI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**VALLEY VELVET P.LTD. & 1 - Petitioner(s)**

**Versus**

**UNION OF INDIA & 3 - Respondent(s)**

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**Appearance :**
MR DV PARIKH for Petitioners
MR JITENDRA MALKAN for Respondents
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**CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA**
**and**
**HONOURABLE MS.JUSTICE H.N.DEVANI**

**Date : 14/02/2006**

**ORAL JUDGMENT**

**(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)**

1.Heard Mr.Devan Parikh, the learned advocate for the petitioners and Mr.Jitendra Malkan for the respondents.

2.Rule. Mr.Malkan waives service of rule on behalf of respondents. In view of the fact that the controversy involved in the present petition lies in a narrow compass, with the consent of the parties, the petition is taken up for final hearing and disposal today.

3.By this petition under Article 226 of the Constitution of India, the petitioners challenge the communication dated 10th December, 2004 (Annexure “D”), whereby the respondent No.4, Superintendent, Central Excise, Himmatnagar has called upon the petitioners to pay a sum of Rs.73,28,029/- which is due for recovery in the form of duty and penalty from one M/s A. Arti Leathers Pvt. Ltd., which was operating from the petitioners' present factory premises before the petitioners took over the same.

4.The petitioner is a company carrying on the business of manufacturing leather cloth. One M/s A. Arti Leathers (hereinafter referred to as “the erstwhile unit”) was carrying on the business of manufacturing leather cloth at the premises which are presently occupied and used by the petitioners. The said company had availed of a term loan from the Gujarat State Financial Corporation (GSFC) and had mortgaged its immovable property and hypothecated its movable plant and machinery to the GSFC to secure the said loan. Thus, the assets of the erstwhile unit comprised of land and building along with plant and machinery. The said unit having defaulted in payment of its dues, the GSFC put up its assets for auction. The petitioner being the highest bidder, its offer was accepted and the assets of the erstwhile unit were transferred in favour of the petitioner by the GSFC in the exercise of powers under Section 29 of the State Financial

Corporation Act, 1951. Accordingly, necessary agreement was executed between the petitioner and the GSFC on 2nd March, 1995 and the possession was handed over to the petitioner on 4th March, 1995.

5.It is the case of the petitioners that the petitioners are carrying on their business from the said premises and are duly registered under the provisions of The Central Excise Act, 1944 (the Act). It is the further case of the petitioners that they have installed several new machinery etc. and have invested substantial amounts in the said business.

6.After a period of almost 10 years since the purchase of the erstwhile unit by the petitioners, the respondent No.4, vide the impugned communication dated 10th December, 2004, has demanded an amount of Rs.73,28,079/- from the petitioners towards dues of the

erstwhile unit, placing reliance upon a decision of the Apex Court in the case of Macson Marbles Pvt. Ltd. v. Union of India, 2003 (158) ELT 424, threatening coercive action, in case the amount is not paid within a period of 15 days. It is the case of the petitioners that they have given their reply to the said communication, by a communication dated 23rd March 2005. That, thereafter, nothing was heard from the department for quite some time and that of late the department is seeking to enforce their alleged claim and have threatened to take coercive action, hence, the petitioners apprehend that their properties are likely to be attached by the respondents.

7. It is in these circumstances that the petitioners have challenged the aforesaid communication dated 10/12/2004 as well as the action of the respondents in threatening the petitioners with coercive action in case of

failure to deposit the amount due from the erstwhile unit towards excise duty and penalty.

8. In response to the notice issued by this Court, the respondents have filed two affidavits-in-reply dated 25th January, 2006 and 27th January 2006. The say of the respondents is that, the Supreme Court in the case of Macson Marbles Pvt. Ltd. v. Union of India, 2003 (158) ELT 424 has held that the sale of an industrial unit in the exercise of powers under section 29 of the State Financial Corporation Act, 1951 (SF Act) is deemed to be a sale by the owner of the property. Hence, it is permissible for the Excise Department to recover the Central Excise dues of the previous owner from the purchaser of the said industrial unit. That the sale in favour of the petitioners having been effected in the exercise of powers under section 29 of the SFC Act, the department was entitled to recover the dues of the erstwhile unit from the

petitioners. That the action taken by the respondents was well within the period of limitation as show cause notice had been issued within the prescribed time limit, and that ever since the dues were confirmed, the respondents have been pursuing the recovery thereof before various forums. That there is nothing in the language employed in the amended provisions of section 11 to indicate that the same is applicable only to transfers effected after the insertion of the said provision. That no period of limitation has been prescribed for taking action under the provisions of the proviso to section 11, hence, there was no bar of limitation insofar as the action sought to be taken by the respondents is concerned. That, by the impugned communication dated 10/12/2004, the petitioners had been called upon to pay the dues of the erstwhile unit, however, no coercive action had been taken. That the petitioners had been given sufficient

opportunity to put forth their views, hence, there is no breach of the principles of natural justice.

9.In the second affidavit, it has been stated that the respondent had lodged its claim in respect of the dues of the erstwhile unit with the official liquidator, hence, the department was not negligent in the recovery of the Government dues.

10.Mr.Parikh, the learned Advocate for the petitioners assailed the action of the respondents on the following grounds:

(1).The action sought to be taken by the respondents is hopelessly time barred and is also bad on the ground of violation of the principles of natural justice and as such, is not sustainable.

(2).That the respondents are seeking to invoke the provisions of the proviso to section 11 of the Act for recovering the dues of the erstwhile unit from the petitioners. That the said proviso has been brought on the statute book with effect from 10/9/2004 only and that the present case can under no circumstances be covered by the said proviso.

(3).That the proviso to section 11 of the Act applies only to assets that are transferred after the proviso was enacted and not to assets that are already transferred prior thereto. That, it could never be the legislative intent to make the proviso applicable to all transfers irrespective of the time when they were made, as the same would amount to opening a Pandora's Box

inasmuch as the Central Excise authorities could then seek to invoke the same against all past dues, for an infinite period of time.

(4).That the decision of the Supreme Court in the case of Macson Marbles Pvt. Ltd. (supra) would not apply to the facts of the present case as the same was decided in the context of Rule 230(2) of the erstwhile Central Excise Rules, 1944, with regard to facts to which the said provisions applied. Hence, though the ratio laid down by the said decision would be applicable to transfers effected after the proviso to section 11 of the Act was legislated, the same cannot be made applicable to the transfer in question as the same does not fall within the purview of the proviso to section 11 of

the Act.

(5).It was submitted that assuming that the proviso to section 11 of the Act could be made retrospectively applicable to prior transfer of assets, the exercise of powers thereunder had to be made within a reasonable time. That, the petitioners had purchased the assets in question way back in March 1995, hence, the respondents cannot be permitted to invoke the said provisions in relation to the said assets after a period of almost ten years thereof. That it is a settled legal position, as laid down by the innumerable decisions of the Apex Court that even where the statute does not prescribe a period of limitation, action must be taken within a reasonable time. That a period of ten years can, by no stretch of

imagination, be said to be a reasonable time.

(6).That, from a perusal of the impugned communication, it is evident that the substantial portion of demand in question relates to amounts which had become due after the transfer of the unit, namely, after the first week of March 1995. That the demand to the extent of Rs.58,12,251/- was confirmed only on 16/10/2001 and the demand for Rs.61,920/- was in relation to an order dated 31st March, 1995. Thus, both the demands are evidently in relation to orders made after the date of transfer. That the proviso to section 11 of the Act contemplates the recovery of sums due at the time of the transfer of the assets of the predecessor unit and not to amounts which had become due

subsequently.

(7).That the penalty component of the demand in question was Rs.27,91,000/-. That, insofar as the recovery of dues towards penalty were concerned, the Apex Court in the very case sought to be relied upon by the respondents, that is, Macson Marbles Pvt. Ltd. (supra), has held as follows:

*"It is difficult to conceive that the appellant had any opportunity to participate in the adjudication proceedings and contend against the levy of the penalty. Therefore, in the facts and circumstances of this case, we think it appropriate to direct that the said amount, if already paid, shall be refunded within a period of three months."*

It was submitted that in view of the

aforesaid, the dues towards penalty of the erstwhile unit could not in any case be recovered from the petitioners.

11.Mr.Malkan for the respondents reiterated the contents of the affidavit-in-reply filed on behalf of the respondents. It was submitted that the respondents were all the time pursuing their remedies for recovery of the sums due from the erstwhile unit before various forums and as such, the action taken by the respondents cannot be said to be time barred. That the statute does not prescribe any time limit for taking action thereunder, therefore, it would not be proper to read any limitation where none was provided. That the proviso to section 11 of the Act, provides that `any duty or any sums of any kind recoverable from the transferor can very well be recovered from the transferee', hence, even dues towards fine and penalty can be recovered from the transferee.

12.For the reasons that follow, as the petition is required to be allowed on the ground of limitation, it is not necessary to deal with the rest of the contentions raised by the parties.

13.It is an admitted position that the transfer in question, namely, the transfer of the assets of the erstwhile unit by the GSFC in the exercise of powers under Section 29 of the SFC Act, in favour of the petitioners took place in the first week of March 1995. That the demands in question relate partly to orders made prior to the said transfer and substantially to orders made thereafter. The respondents have sought to initiate recovery in relation to the dues of the erstwhile unit by the impugned communication dated 10th December, 2004 after a period of almost 10 years from the date of purchase of the said unit by the petitioners.

14.It is settled legal position that when no time limit is prescribed for exercise of a power under a statute, it does not mean that it can be exercised at any time; such power has to be exercised within a reasonable time. That any power conferred under a statute is required to be exercised in a reasonable manner which inheres the concept of its exercise within a reasonable time.

15.The Apex Court, in the case of *Ibrahimpatnam Taluk Vyavasaya Coolie Sangham v. K. Suresh Reddy, [2003] 7 SCC 667*, in the context of exercise of *suo motu* powers, has laid down as follows:

> *"Exercise of suo motu power "at any time" only means that no specific period such as days, months or years are not prescribed reckoning from a particular date. But that does to mean that "at any time" should be unguided and arbitrary. In this view, "at any time"*

*must be understood as within a reasonable time depending on the facts and circumstances of each case in the absence of prescribed period of limitation."*

16.This Court, by a decision rendered on 16th December 2005, in the case of Ani Elastic Industries v. Union of India, Special Civil Application No.20528 of 2005, wherein a similar issue was involved, has held as follows :

*"It is a settled legal position that when a power is conferred by a statute without mentioning the period within which it could be invoked, the same has to be done within a reasonable period, as all powers must be exercised reasonably, and exercise of the same within a reasonable period would be a facet of reasonableness. In the present case, assuming that it is permissible for the respondents to take action under the proviso of Section 11 of the Act in respect of dues which have crystallized prior to the introduction of the proviso to Section 11 of the Act vide the Finance Act, 2004, even then as held by the Apex Court in a catena of decisions such action has to be taken within a reasonable time. In the case of State of Gujarat Vs. Patil Raghav Natha (supra) the Apex Court has held that when there is no period of limitation prescribed, the power must be exercised within reasonable time. In the said case the*

*power exercised beyond a period of one year was held to have been exercised beyond a reasonable time. In the circumstances, this Court is not satisfied that the respondents have exercised powers under Section 11 of the Act within a reasonable period of time. The lapse of a period of five years in seeking to recover the dues of the erstwhile unit from the auction purchaser, namely, the petitioner, is certainly not a reasonable time for exercise of power, even if it is not hedged in by a period of limitation. Therefore, the impugned order cannot be permitted to stand."*

17.In the facts of the present case, admittedly, the respondents have sought to initiate recovery of the dues of the erstwhile unit from the petitioners after a delay of almost 10 years. The respondents cannot sit on the fence and allow equities to be created in favour of the third parties and then, seek to recover the excise duty liabilities of the erstwhile unit from the unwary, unsuspecting buyer, as otherwise it would be putting premium on their own default. The authorities cannot be permitted to wake up from their slumber and

take shelter behind the amended provision of the Act, that too, an amendment which has been brought on the statute book, several years after the assets in question have been transferred. More so in the facts of the case. After the petitioners purchased the properties in auction, they sought registration under the very Act for the purposes of manufacturing the goods by using the same properties, including the machineries. It is not even the case of respondent authorities that any fraud was committed while seeking registration. Considering the principles enunciated in the aforesaid decisions, the action of the respondents in seeking to recover the central excise dues of the erstwhile unit from the petitioners is hopelessly time barred.

18. In the result, the petition is allowed. The action of the respondents in seeking to recover the dues of the erstwhile unit from the

petitioners, is held to be barred by limitation. The impugned communication dated 10th December, 2004 is hereby quashed and set aside.

19.Rule is made absolute, accordingly, with no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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